Supreme Court, U.S.
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No. ———→

In the Supreme Court of the United States

HENRY CALDWELL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the search warrant presented is facially sufficient where it fails to set forth a probable cause basis for a belief that certain generically described items, said to be subject to seizure as contraband, could be located somewhere inside the residence targeted to be searched.

II

Whether an Affidavit submitted in quest of a search warrant, that relies wholly and solely on information supplied by one who was not expressly regarded as a reliable person or even vouched for by the Affiant as being reliable, can survive meaningful scrutiny.

III

Does the accused have a constitutional right to challenge the veracity of an Affidavit on the basis of facts that not only controvert the alleged informant's very existence, but also puts in issue whether this alleged person (if he does exist) actually supplied the Affiant the information he was credited in the Affidavit with having provided?

IV

Is an open, or at least an *In Camera* Hearing, required when the accused submits proof that not only challenges the existence of an alleged "Information Source," but also raises the spectre that other factual assertions attributed to the source were made out of whole cloth by the Affiant?

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The Petitioner, Henry Caldwell, respectfully petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit made herein on **November 5, 2004**. This Court, as **Appendix "A"** shows, extended the time in which the Petitioner could file this Petition, until March 5, 2005.

OPINIONS BELOW

The Opinion of the Court of Appeals, affirming these convictions, is included in the *Appendix* as **Appendix "B,"** *infra*, pp. B-1. This Opinion is not yet reported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Given the judgment by the Court of Appeals was finalized on **November 5, 2004**, when the United States Court of Appeals affirmed the conviction, the jurisdiction of this Court is invoked under Title 28 United States Code, §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent text of these Amendments reads as follows:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person ... shall be compelled in any criminal case to be a witness against himself...."

Amendment VI:

"[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him . . . "

STATEMENT OF THE CASE

Henry Caldwell, the Petitioner herein, was charged with the crimes of Unlawful Possession of a Firearm, in violation of 18 U.S.C., § 922(g)(1), and Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C., § 841(a)(1) and (b)(1)(A). To these charges the Petitioner, although he pled guilty, expressly reserved the right, under favor of Rule 11 (a)(2), to appeal the Court's denial of his Motion to Suppress.

The facts in this case are quite simple. Distilled they show the Akron, Ohio Municipal Court issued the Search Warrant that authorized the search of the premises involved in this case. As to these premises, the record is clear -- as was ultimately determined by the Court, the Petitioner had the requisite standing.

In the Motion to Suppress centralized in this cause, it specifically averred, *inter alia,* that the Affidavit had alleged:

1. That "two drug transactions . . . [had] supposedly occurred inside the premises."

2. That as to the first alleged sale ". . . [it was said] an *unspecified* quantity of money . . . was exchanged for a quantity of cocaine." It was further said that the source claimed the defendant was the person he had dealt with. (*Id., Affidavit,* ¶¶ *2 & 3*).

3. That during one of these two (2) alleged episodes

this "source" was credited with having "observed a large quantity of crack cocaine inside of the premises" (*id.*, ¶ *2*).

4. That . . . this same "source" reported he had "observed several assault type weapons inside the premises" (*id.*, ¶ *3*). (Where on the premises it was not said. And beyond the generic description given, the weapons were not further described.)

5. That while the Affidavit tells its reader that the defendant was convicted in 1982 and 1992 of felony drug offenses, and had a conviction for felonious assault in the year 2000 (*id.*, ¶ *4*), *it is significant that nowhere in the Affidavit is it even alleged how the affiant came to know that the defendant lived in, or was an occupant of, or had ever been seen on the described premises* . . . .

* * *

7. That the affiant's failure to offer anything that shows his source could identify the defendant and how he connected the defendant to the premises, or that shows the alleged "source" existed outside the affiant's naked references to him is truly significant. . . .

8. That also significant to any meaningful analysis of the issues here is the further critical fact that the funds supposedly given to the "source" to make these purchases were not identified in any way. . . . (This is significant because the warrant specifically sought unspecified "U.S. currency".)

9. That for reasons known only to the affiant, the Affidavit nakedly stated (*id.*, ¶*6*) that the alleged

source supplied the affiant with unspecified information concerning "the possession and sale of controlled substances in the Akron ... area." As to this, the affiant asserted that he could corroborate this naked and unclad factual assertion.

10 That given the defendant is openly challenging even the existence of the alleged "information source," and given the fact the affiant's statement as to his existence is totally uncorroborated, it seems clear enough the Court under these circumstances should require the government to produce this alleged source for at least an "*in camera*" hearing. This should be done not only so that the source's existence can be satisfactorily established, but also a record made that shows the amounts of money supposedly used to consummate the alleged purchases, and any other documentation that could prove to be relevant as to whether or not the affiant created this alleged person out of whole cloth - - as police have been known to do.

Defendant's Motion to Suppress. J.A.,[1] p. 17, *et al.*

A

Other facts of consequence here are easily stated. The Search Warrant Affidavit in this case nakedly alleged an "information source" reported that he (this alleged "source") had made two isolated purchases inside the described home from Henry Caldwell, the Petitioner. And, it was said that

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[1] The "**J.A.**" reference is to the "Joint Appendix" filed in the Court below, the United States Court of Appeals for the Sixth Circuit.

while on the premises, he supposedly saw an unspecified quantity of drugs and he supposedly described a couple of assault weapons that were said to have been seen. As to these unclad representations, it was pointed out to the Court that not only did the Affiant fail to provide any information about his "alleged" source, but also there was nothing in the Affidavit that connected our Petitioner to this home in any way. It was not even said that he lived there, frequented the premises, or even that he or his vehicle were ever seen in the vicinity. Indeed, apart from stating, in isolation, that the *Affiant* knew Henry Caldwell's past record, and that he had been told about the purchases said to have been made on the premises, the Affiant not only failed to relate in his Affidavit how much money was spent in these two sales, he also concealed from us what quantity was supposedly purchased. Indeed, the absence of any alleged surveillance of the premises, which so often has been said to be indicative of drug activity, along with the fact that the Search Warrant did not particularize the money supposedly spent in these alleged sales is compellingly significant. It tells us (as it should have told the State Judge who issued the warrant and the District Judge) that clearly there were problems of consequence with this Affidavit and Warrant.

Specifically it was Argued:

> It's significant they don't vouch for him, because if they did, they would have used the word *reliable*. So we know we're dealing with a person who in effect could very well be a casual person on the street. And to tell us, as the government does in its response, and to tell us it was stated in the Affidavit that this man has all kinds of experience with drugs and that - - I have all kinds of experience with drugs, and I know how they are packaged and how they are distributed,

that that - - it doesn't make - - that's not specific information about drugs being at a particular place on a particular day when a search warrant is sought.

They tell us . . . in the Affidavit that this person knows how drugs are distributed. Well, anybody who can read the newspaper knows how drugs are distributed. So I don't see how that adds weight to the credibility. She cites *Gates*, and that's appropriate. Grant[ed], *Gates* eliminates that *Spinelli* test for reliability and the informer was not deemed to be dispositive, but they are still relevant.

And I think the Affidavit here on the basis of which the search warrant was issued is truly defective. I think that the lack of any corroboration whatsoever, or any information about who this person is, why he was motivated to curry the favor of the police, did they pay him, was he working off a case, was he out on bond, was he on parole, all of those things I think the Judge who issued the search warrant ought to have been made aware of, and it is those things that make me believe that the police in Akron are no different from the police in Cleveland.

I believe oftentimes, not always, that informants are made out of [w]hole cloth. I know . . . case[s] I read across the country, including the FBI, they have created informants out of [w]hole cloth. I believe that's the possibility here. And I think that's one of the things that the Court ought to look at to order them to produce the informant.

Transcript, pp. 5-10.

Significant here, the Court in its Opinion, *Apx. "B", pp. 3-5*, artificially concluded the fact that one who was not even

credited with being a reliable informant had, albeit nakedly so, supplied information that was worthy of being relied on. In so doing the Court seemingly exposed a willingness to ignore the fact that even past instances of reliability do not conclusively establish an informant's reliability. Indeed, the information supposedly supplied in the past was generic and non-specific. Here, it merely confirmed rumor type information concerning, arguably, drug suspects and the like. Indeed, it should be noted that aside from the affiant's naked and unclad representation that an alleged "information source" reported he had made two (2) drug purchases inside a home, and that the person he supposedly purchased the drugs from had a record for drug dealings in the community (a fact that was known by the affiant), there was nothing else said in the Affidavit about these asserted events. Thus, we only have the alleged source's hearsay statement that this occurred. Indeed, contrary to the suggestion, in the Opinion, the affiant nowhere in his Affidavit suggested that he saw this event. For aught that appears the Court could very well have been influenced by the Government's argument that he had in fact observed these alleged sales.

On this narrow point, the enormity of the lack of corroboration here was magnified by the fact that this alleged person (again, only dubbed by the affiant as an "information source") was not credited with having provided any information that showed he was not relying on casual rumors circulating in the criminal milieu as to Henry Caldwell's asserted reputation.

Our point here is that even conceding the law to be that under the totality of circumstances the corroboration of information provided by an alleged source can be a strong indicia of his reliability, this tenet does not help the Government. As applied here, the question becomes: could

the Court conclude from anything said in the Affidavit that there was any evidence set forth which established that the informant not only existed, but was reliable? Surely none of the Courts below should have, as appears to have been the case, rotely accepted the affiant's conclusory statement that this *alleged* person was reliable as being sufficient to establish both his existence and his reliability. This is particularly so since there was a total lack of any information that related to the alleged person's history and motives.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The arguments made herein show that while the Court below fully recognized, and indeed said so, that *when* an alleged informant is "named" in the Affidavit, and the affiant-officer "personally observed" this person "make the controlled purchase," this makes for a circumstance that is compelling. *Opinion, Apx., "B," p. B-4.* Indeed, if this had happened here, simply put, we would not be here.

So postured, it follows that the Court's major premise for its dispositional thesis is truly flawed. This follows because "the facts of *Pinson*,[2]" the case relied on by the Court, were not "similar in many ways to those in the present case" (*ibid*). Indeed, the alleged person was not identified and the affiant not only did not witness any controlled purchase, there was no proof that connected the Petitioner to the premises, or put him on the premises when the alleged sale occurred. As argued below, all these facts are significant.

To begin with, the Search Warrant Affidavit in this case was based solely on information supposedly supplied by one who was not even said to be a reliable informant. Thus, it is

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[2] *United States v. Pinson*, 321 F. 2d 558 (6th Cir. 2003).

significant that the Court was fully advised that nothing was said in the Affidavit that shows any basis whatsoever for crediting anything said by this alleged source. Likewise significant here is the fact that the alleged source, if he did exist, actually had what counsel for the Government termed as being "baggage" (*Transcript, p. 19*). And, of course, *none of this baggage was disclosed*. Clearly then, one can readily infer that this source acted so as to curry the favor of the police.

On this narrow point, it should be understood that there was no way the information supplied, if any was, by this alleged person could ever be appropriately assayed or assessed. See *United States v. Czupriniski*, 8 F. 3d 1113, at 1117 (6th Cir. 1983). Likewise significant here, is the further fact of the District Court's assertion that the "source's" designation of Henry Caldwell as the seller was being regarded by him as "gratuitous." This thesis establishes the Court was convinced the two mentioned sales had in fact occurred. This flawfully reasoned rationale is challenged because clearly there is no way the Circuit Court should have ignored, as the District Court sought to do, the impact of his recognition that the specific reference to Henry Caldwell in the Affidavit perforce influenced (we can suppose) the Magistrate's decision to issue the warrant. The reference here is to the Court's decision that "Caldwell, as the person the drugs were purchased from" arguably gave credence to the "probable cause" determination (*Transcript, p. 25*).

Actually, this conclusion is inescapable. This follows unless it can be said the extensive references in the Affidavit itself to Henry Caldwell can easily be likened to cannon-fodder and served that sort of role as justifiable in being included in the Affidavit.

The Court's conclusion, with reference to the Motion to Suppress, was that despite the fact Caldwell indeed had standing, the Affidavit was nonetheless sufficient to establish probable cause. (*Transcript, at pp. 25-26.*) It was also held that the defense could not require the Court to delve into the facial sufficiency of the warrant. Indeed, the Government's defense of the Affidavit, as we read its principal contention, continues to befuddle counsel. This it does, not so much because of what it says, but all the moreso because the significance of its flawed thesis somehow actually eluded the Court. Reference here is to the statement in the Government's response to the Motion. Here counsel-opposite wrote:

> In this case, information from an informant is not the only basis for probable cause. *There was corroboration of the information learned from the affiant's investigation*, including the two controlled buys from the address to be searched.

Government's Response to Motion to Suppress, J.A., p. 39.

Counsel's response to our open assailment of the above flawed thesis is worth repeating. Here it was argued, with only some slight variations, that in this case the insolvable and insurmountable problem (for the government), with the categorical proposition precisely represented in the above quote, is that counsel-opposite's reference to the existence of *corroboration* cannot be defended. Clearly, this follows because there is nothing, absolutely nothing, said anywhere in the Affidavit that translates into corroboration for anything said by the alleged source. Indeed, with this being so, to say an "investigation" (of some unnamed and unspecified person or place) was *corroborated by* the "controlled buys [supposedly made] from the address" (*ibid*), as was precisely stated by counsel-opposite, is undeniably a statement that makes no sense at all. This is especially so since the Affidavit

does not illustrate anything that fleshes out the statement: "Affiant's investigation." (*Ibid.*)

Having said that, it was also argued the statement itself cannot possibly be validated. With this being so, it follows that to the extent this is so (*i.e.*, that there is no way it can be said the alleged "controlled buys" provided *corroboration* for some unspecified investigation), it was not otherwise refined. So postured, the government's thesis in this regard must be viewed as a ploy made in apparent desperation.

Even this is not all. It was also said then, and is being repeated here, that our assailment of the naked and totally unclad "assertion" (that something said in the Affidavit was *corroborated*) is magnified by the further fact that counsel failed to direct the Court's attention to what it is she would have the Court credit as having been *corroborated by the alleged sales*. This failure clearly had to have been a deliberate gamble that the Court would simply avoid its responsibility in this case. This follows because it can hardly be that counsel was suggesting the two (2) isolated sales, alleged in the Affidavit (*Motion to Suppress, J.A., pp. 18-19, at ¶¶ 2 & 3*) were corroborated by anything that was said in ¶¶ 1, 4, 5, 6, 7, 8, 9 or 10, of this Affidavit.

ARGUMENT NO. I:
AN AFFIDAVIT FOR A SEARCH WARRANT IS FACIALLY INSUFFICIENT WHEN IT FAILS TO SET FORTH PROBABLE CAUSE TO BELIEVE PARTICULARLY DESCRIBED PROPERTY SUBJECT TO SEIZURE CAN BE LOCATED IN A SEARCH OF PREMISES DESIGNATED IN THE AFFIDAVIT.

The law is clear: an Affidavit in support of a search warrant must show there is a fair probability that contraband,

or evidence of a crime, will be found in a particular place. As to this thesis, the failure of the search warrant issued in this case to particularize the money supposedly used to make the purchases (said to have occurred) is significant. For clearly there would be no reason to believe a search would provide any other specific evidence that could be related to the two (2) sales said to have taken place days before on the premises.

Clearly then, at least in our judgment, this Affidavit is even less than a barebones Affidavit in that it *only* shows the affiant's naked endorsement of what his alleged source supposedly told him. Distilled, what is categorically being said is that the Affidavit does not set forth anything close to a substantial basis for crediting the alleged source's statements as to the purchases said to have been made by him from our Petitioner. The same is also true of the observations of weapons and drugs supposedly made by this alleged person. Simply put, other than the "source's" statement, supposedly made to the affiant, there was nothing said in the Affidavit that even slightly suggests the Petitioner was ever inside the home, and if he was, that he was there alone, or when the alleged person made his alleged entrances and exits.

ARGUMENT NO. II:

WHEN AN AFFIDAVIT SUBMITTED IN QUEST OF A WARRANT TO SEARCH RELIES WHOLLY AND SOLELY ON INFORMATION SUPPLIED BY ONE WHO IS NOT EXPRESSLY REGARDED AS (AND VOUCHED FOR AS BEING) A RELIABLE INFORMANT, IT IS NOT ENOUGH TO SIMPLY SHOW THE AFFIANT OBVIOUSLY BELIEVED WHAT HE HAD BEEN TOLD - - THE APPARENT CASE HERE.

The critical fact here is that the alleged (arguably phantom) source of the information, relied on by the affiant, was only credited with being an "information source." To the perceptive, this is most significant. This follows because an "information source" ranks far below a "confidential source" and "an informant" in the Attorney General's guidelines on the use of informants. *See Attorney General's "Manual Of Investigative Operations And Guidelines,"* Vol. II, pt. 1, §137-1.1. *Also see D.E.A. Agent's Manual, Ch.* 6612(1)(B) and *U.S. Custom's Service Operations Guidelines,* §41-11(F).

Also, the use of the characterization "information source" is indeed likewise compellingly significant in the sense that the characterization was chosen over the term "confidential informant." As to such informants, we know they are persons who are usually approved and registered with a unit of the law enforcement entity involved. And, it is beyond dispute such persons expect some type of consideration for the information they supply. Usually they come from the criminal milieu. Mere "information sources" certainly are not as highly regarded as those people who are otherwise classified. *See, e.g., D.E.A. Manual,* §6612(C). *Also see F.B.I.'s Manual Of Investigative Operations And Guidelines,* §137(A)(1).

The upshot of the point here made emphasizes the fact that the affiant deliberately *did not* reveal anything in his Affidavit which gave even a slight clue as to why a warrant should have been issued on the basis of the word of this alleged person. On the other hand, clearly a hearing would have required the Court to at least determine if the alleged informant even existed. Also, it would have enabled the Court to assay, in a meaningful way, whether his assertions should have been credited with impunity - - as arguably they seem to have been, at least, so far.

On the other hand, our belief is that when a Court issues a search warrant based solely and wholly on inferences and insinuations that arise from information supplied people who act in an effort to curry the favor of the federal agents, the information supplied by these people must be appropriately assayed and assessed. This should, of course, be done in a way that reckons with the fact that there has to be a presumption of unreliability that attaches to statements provided by people who are admittedly acting in their own self interest. With this being so, the critical point in all this is that the inferences required to be drawn here are truly and undeniably suspect. This is especially so since they were solely, absolutely and undeniably dependent on raw hearsay provided by an arguably phantom informant. Also, here we have a total lack of any basis, to say nothing of the required "substantial basis," for crediting any of this rank hearsay. Stated another way, the decision to issue the search warrant in this case was not based on any factual information that can be said to have had any indicia of reliability and was indeed wholly uncorroborated.

Here, of course, the Court should be mindful of what was said by one authority, whose experiences with informants and the like is perhaps unequaled by any Judge (anywhere). He wrote (while working as an Assistant Attorney General in the Criminal Division, Public Integrity Section, U.S. Department of Justice) as far back as 1984, that:

> Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. . .They are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some, conning people is a way of life. Others are just

> basically unstable people. A "reliable informant" one day may turn into a consummate prevaricator the next.

Stephen P. Trott, The Successful Use of Snitches, Informants, Coconspirators, and Accomplices as Witnesses for the Prosecution in a Criminal Case (Jan. 1984). Assistant Attorney General Criminal Division, Public Integrity Section, United States Department of Justice.

Further, it is always important to know whether the source was *working off his charges* "as is often the case and clearly appears to have been so with the alleged "confidential" person relied on in this case. Given that the Affidavit did not even allege this source had a past track record, such as tends to demonstrate reliability, and since clearly the only proof of his existence rests solely on the word of the police officer, it follows proof of the source's existence, or non-existence, was something that should have been dealt with by the Court.

Hopefully this Court will surely agree that these facts cast a dark shadow on the reliability of the alleged source as well. While all this is bad enough, it is augmented by the fact that the Court that issued the warrant in this case was not told any of the negative things that should have been factored into any probable cause equation. If these inclusions had been referred to in the Affidavit, who can say the Court would nonetheless have issued the warrant? On this point, the Court should consider *United States v. Medina-Reyes*, 877 F. Supp. 468, 472 (S.D. Iowa, 1995). *Also see United States v. Brumel*, 976 F. 2d 1235 (9th Cir. 1992).

The upshot of all that has been argued above makes it clear the *Motion to Suppress* should have been fully ventilated and, as we contend, granted in all respects and the fruits of this illegal search should have been ordered returned. Clearly then, if the Court that issued the warrant was required, as the

Court is now, to determine there was a "fair probability that . . . evidence of a crime . . . [would] be found" in the home targeted (*Illinois v. Gates*, 462 U.S. 213 [1960]), it should follow that the answer to this query is really dispositive

ARGUMENT NO. III:
AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO CHALLENGE THE VERACITY OF THE AFFIDAVIT ON THE BASIS OF WHICH A WARRANT WAS ISSUED.

Franks v. Delaware, 438 U.S. 154 (1978), is the case usually cited in the above proposition. In so ruling the Court noted a compelling fact, *i.e.*, that "a flat ban on impeachment of veracity could denude the probable cause requirement of all meaning," and this by allowing searches based on false allegations by police officers to go unchallenged and unremedied (*id., at p. 168*). Having said that, the Court below, as we read the Opinion, was obviously convinced the requirement that warrants be supported by sworn Affidavits and issued only after a judicial evaluation has been made (as to whether it set forth probable cause), is in actuality only a technical requirement. This thesis ignores a well known reality. Simply put, regardless of the safeguards, including alternative sanctions such as a prosecution for perjury, they have never been sufficient to prevent police perjury or recklessness in seeking warrants (*id., at p. 169*).

Granted, *Franks* is undeniably compelling in its thrust and indeed is fully applicable here. Indeed, to the perceptive, once it is realized that the search warrant Affidavit in *Franks* differs in certain critical respects from the one in our case, then it becomes clear *Franks* alone should not have controlled the outcome here to the extent that it did. Here, it should be noted that our assailment of the use of informants was somewhat recently validated by Congress in a report recently

released (November, 2003). Indeed, in a 144 page report, released by the *House Committee on Government Reform*, entitled *"Everything Secret Degenerates: The FBI's Use of Murderers As Informants,"* such use was labeled as "one of the greatest failures in the history of federal law enforcement" (*ibid*).

Likewise significant here are other critical aspects of the Affidavit and of the Petitioner's thesis. These include in its focus the defense's contention that nothing is said in the Affidavit (other than the two alleged sales) that connected Henry Caldwell to these premises. Reference here is to counsel-opposite's categorical statement that these "premises were targeted, not Henry Caldwell" and that he just happened to be present when the premises were searched. As counsel put it, it was not important who was living at the house, the fact that "drugs are being sold out of the house by one person or more people," is all that was important, from the "government's point of view." Significant here, in embellishing her point, counsel argued that the only thing of importance here was "the evidentiary value of . . . [the] contraband buy" (*Transcript, p. 19*). As counsel-opposite saw it, and doubtlessly she believes the fact to be that:

> It doesn't matter - - certainly, this officer knows a lot more about the informant than he included in fact in his Affidavit. In fact, he knows the exact date and time of each of the buys. *He knows how much money was spent, and he knows the guy's name and what all . . . [his] baggage is.*[3] But the evidentiary quality of

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[3] The statement here emphasized shows clearly counsel-opposite does not get it. It is simply not important what the Affiant knows about his alleged source and "his baggage." What is important is what the Affiant put in the Affidavit about the informant and "his

> a controlled buy is that you can set all of that aside, and you can search the guy and send the money and send him in the house and watch him go into the house and come out and give you dope and not have the money on him anymore.

Id., p. 19. (*Emphasis supplied.*) As argued below the flawed notions of counsel-opposite to the contrary, notwithstanding, the Affidavit in this case was truly lacking in substance sufficient to make for probable cause.

In responding to the Motion to Suppress and to our contention that, in addition to other flaws, the Affidavit was facially insufficient because, among other things, nothing attributed to the alleged source was corroborated, counsel responded with the following nonsense:

> In this case, information from an informant is not the only basis for probable cause. *There was corroboration of the information learned from the affiant's investigation,* including the two controlled buys from the address to be searched.

Government's Response to Motion to Suppress. (J.A., p. 39.) (*Emphasis supplied.*)

As was originally argued in our response to the Government's argument cited above, the insolvable and insurmountable problem with accepting the categorical proposition (asserted in the above quotation) is presented by

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baggage" - - absolutely nothing. *Cf., United States v. King*, 227 F. 3d 732 (6th Cir. 2000). One thing *King* makes clear is that "a Magistrate must not serve as a rubber stamp for police . . . [And] to that end deference to the issuing Magistrate . . . is not boundless" (*id., p. 739*). Clearly the Court below ignored this unassailable concept.

the reference therein to the existence of *corroboration* for the "affiant's investigation." It is again argued that this follows because there was nothing, absolutely nothing, said in the Affidavit that translates into corroboration for anything said by the alleged source. Again, it is being argued that: to say an "investigation" (of some unnamed and unspecified person or place) was *corroborated by* the "controlled buys [supposedly made] from the address," was a statement that makes absolutely no sense at all. In addition the statement itself cannot possibly be validated by a reference to any specific investigation. This follows because there is no way it can be said the alleged "controlled buys" provided *corroboration* for some unspecified investigation. Simply put, it could not be any clearer that the Government's thesis must be viewed as a ploy made in desperation.

Also, at the District Court level, the Petitioner sought to have the Court require the Government to actually prove the affiant's alleged source actually existed and was not made out of whole cloth - - as some officers are known to do. Specifically, counsel argued:

> That given the Defendant is openly challenging even the existence of the alleged "information source," and given the fact the affiant's statement as to his existence is totally uncorroborated, it seems clear enough the Court under these circumstances should require the government to produce this alleged source for at least an "in camera" hearing. This should be done not only so that the source's existence can be satisfactorily established, but also a record made that shows the amounts of money supposedly used to consummate the alleged purchases, and any other documentation that could prove to be relevant as to whether or not the

affiant [artificially]. . . created this alleged person . . . as police have been known to do.

Defendant's Motion to Suppress. (J.A., at p. 19, ¶10.)

Stranger yet, when asked to proceed, counsel for the Government advised that she intended to call the affiant (on the Affidavit) to establish good faith. *United States v. Leon*, 468 U.S. 897 (1984). Defense counsel then reminded the Court that good faith only arises when the warrant has been declared defective. However, responding more directly to the Court, counsel argued that there was absolutely no corroboration for what was shown to be undeniable "hearsay" declarations (in the Affidavit) that were attributed to someone referred to therein, not as a reliable informant, but merely as an "information source."

Indeed in directly addressing inquiries from the Court it was emphasized then, as it is now, that there had to be a reason why the informant was not characterized as being "a reliable informant," why nothing was said about "his background" or why he "was motivated to" act as he did. And, even more importantly, it was emphatically stated that "we don't know from the Affidavit that the alleged information source even knew the Defendant or could identify him" (*Transcript, p. 4*). And, it was said there was "no proof Caldwell was known to be on the premises at the time the man [*i.e.*, the alleged information source supposedly] went [in]" (*ibid*). Further, it was argued that while money was supposedly involved in the so-called controlled buys, nothing was said about how much money was involved and the warrant did not identify any money (*Id., p. 5*). Given the Government conceded their informant did in fact have certain unspecified "baggage," it is significant that the Court *did not* dispute our contention, and in fact recognized our

interpretation of precisely what counsel said. Here it was stated:

> Counsel [for the Government] has just said . . . to the Court that this informant has baggage. Now the question is wasn't the Magistrate entitled to know what that baggage was before he or she issued the search warrant.

Id., at p. 21. Cf., Id., at p. 24.

Still, in rejecting the Motion to Suppress, the trial Court made several additional determinations of significance here. First off, the Court recognized from the Affidavit that the Affiant had stated two controlled buys were made, by his source, at these premises. As the Court put it, the listing of the Petitioner's name as the seller was simply "gratuitous." *Id., at p. 25.* This was said to be so because the name of the seller was not "necessary." Also, as the Court saw it, the name Henry Caldwell "probably . . . [gave] more credence to the probable cause that they name an individual" (*id., at p. 25*), than would be the case if no one was named. Having said that, the Court then somehow convinced itself despite our assailments, and other infirmities, "the warrant itself, on its face establishes probable cause" (*Id., at pp. 26*). Also, the Court declared that there had been no showing that the Affiant actually knew any of the information in the Affidavit "was false at the time and . . . *was material to the execution of the warrant.*" Further, the Court reasoned that in any event the officers had "a good faith belief . . . to execute the warrant" (*id., at p. 26*).

ARGUMENT NO. IV:
AN OPEN, OR AT LEAST AN *IN CAMERA*, HEARING IS REQUIRED WHEN WHAT IS BEING CHALLENGED IS THE VERY EXISTENCE OF, BOTH, AN ALLEGED "SOURCE," WHO WAS NOT OTHERWISE IDENTIFIED, AND THE ASSERTIONS ATTRIBUTED TO THAT "SOURCE".

In *United States v. Giacalone*, 853 F.2d 470 (6th Cir. 1988), our Court made for us the point being contended for here. This was done when the Court held:

> We believe that the trial judge should retain the discretion to determine what type of hearing is necessary, if any, to determine the veracity of the affiant in cases where the defendant has alleged that the Affidavit contains false information, but has failed to make a "substantial preliminary showing" that the *affiant* has lied such as that which would require a *Franks* hearing.

Id., pp. 477-478, n. 1. Here, of course, Henry Caldwell forthrightly denied[4] that he participated in the drug sale transactions alleged in the Search Warrant Affidavit, which

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[4] In his Affidavit the Defendant denied, categorically so, the accusation made against him by the alleged "information source." This fact makes it clear that the likelihood is good no such source exists. Or, if a person exists who entered these premises, he did not provide the affiant the information attributed to him. So postured, it should be understood the contentions made here include direct accusations that bear on the credibility of the affiant and the existence of the alleged source. Also it is being contended that if the "source"exists, the affiant was unreasonable in believing he was worthy of belief.

sales were said to have been made while he was on the premises involved in this case. Again, no proof outside the hearsay statements of the "source," with reference to these alleged transactions, connects Henry Caldwell to these premises or to the asserted sales supposedly made to this alleged source. This is so despite the truly false finding by the Court of Appeals that the affiant in this case "actually witnessed the controlled purchases." *Appendix "B", Opinion, p. 5.* Simply put, what possessed the Court of Appeals to make this finding is a true mystery.

Granted, as we recognize, the privilege against disclosing the identity of an informant is based on the public's interest in effective law enforcement. But this interest must be balanced by the requirement of fundamental fairness. *See Roviaro v. United States*, 353 U.S. 53, at 59-60 (1957). Also, we likewise recognize that in *McCrary v. Illinois*, 386 U.S. 300 (1967), the Court conditionally held that the identity of an informant need not be disclosed even where the informant's information supplied *the* predicate for probable cause determination. Yet, it should not be overlooked that in *Roviaro* the Court stated the "Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" *was not absolute* (*353 U.S., at p. 59*). Also, we understand the law to still be that: "where the disclosure of an informant's identity, or of the content of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." (*Id., at pp. 60-61.)*

Given the above cogent contention, the Petitioner contended that *only* the alleged "information source" can (if he exists) clarify and verify whether a sale of any drugs was made to him, by whom, and when in fact this occurred. He

can certainly explain whether others were present and what inducements were used by the officer to control him and why inducements were even necessary. This is significant because it was said that Henry Caldwell would testify he made no sale of drugs to anyone. The essence of his proposed testimony was that it would show the officer *lied* or was *lied to*. This raises the distinct possibility that drugs found in this house were planted by the police (which has been known to happen), or they were planted by the alleged source (whose relationship to the premises was not explained), or the officer made up this tale and the very existence of the informant.

Also, it is a further fact of significance that the affiant here did not precisely identify the money supposedly used to make the alleged purchase, which (had such occurred) should have been particularized as something to look for in a search of this home. Additionally, there was nothing said in the Affidavit about any surveillance made of the premises. Boiler-plated allegations of this ilk are usually said to indicate drug activity. And, there is nothing said in the Affidavit as to why this home was targeted. Even this is not all. Nothing was said in the Affidavit which even slightly suggested Henry Caldwell was inside the home, or was believed to be inside, when these alleged sales occurred - - if they in fact did.

While all that is bad enough, the fact that the alleged source was not credited with saying where on the premises he *observed* the other drugs referred to, and did not estimate the quantity of drugs supposedly seen, really makes our point. Also, he did not say where the guns he supposedly observed were located. But, even this is not all, the alleged source was not credited with having said anything that showed he was ever inside this home.

Significant here, it seems clear that when the Affidavit for the warrant in this case was written, arguably it was expected

that any challenges lodged against it would be rotely dealt with in the State courts in Ohio - - as is usually the case. Hence, the affiant could very well have assumed, and with virtual impunity, that his Affidavit would surely pass muster, as they always do. *See e.g.*, *State v. Haynes*, 25 Ohio St. 2d 264 (1971), affirmed on the fourth amendment issue, but reversed on other grounds. *See State v. Hunt*, 22 Ohio App. 3d 43 (8th Dist. 1984) and *State v. Dodson*, 43 Ohio App. 2d 31 (8th Dist. 1974). These cases show that the reputation of the police (in our area) for inventing facts, in these types of situations, is well deserved. *Also see United States v. Alexander*, 740 F. Supp 437 (N.D. Ohio, 1990), *State v. Washington*, 144 Ohio App. 3d 482 (8th Dist. 2001) and *State v. Gales*, 173 Ohio App. 3d 55 (8th Dist. 2001).

Thus it is significant that the challenge here was lodged in Federal court. With this being so, our belief was it could not be resolved on the basis of any general principled analysis as surely would be done in State court. This follows because the single most important factor alleged in the decision to issue the warrant (*i.e.*, in the Court's probable cause determination) has to be the existence of, and the credibility of, the alleged (arguably phantom) informant. Indeed, starting with the fact that he was only referred to as an "information source,"[5] as

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[5] As to this designation, what was said by the Sixth Circuit in *United States v. Allen* is especially apt here. There it was written:

> We hold that where a known person, *named to the magistrate, to whose reliability an officer attests* with some detail states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached Magistrate may believe that evidence of a crime *may* be found. There is, of course, no *guarantee* that the evidence will still be there, but the magistrate may

distinguished from being classified as a *reliable informant*, it follows the issuing judge should have been alerted to, and should have dealt with, the fact that there is a significant difference between these designations.

Because this is so, the position is here taken that the presence of so many serious omissions from the Affidavit makes for issues the District Court should have dealt with. Among the omissions being referred to was the omission from the Affidavit of any information concerning the "information source's" motivations for cooperating with the police. Also omitted was any information that discussed the criminal history of the alleged source, or any revelation as to whether he was attempting to work off charges he (or some third party) faced. Further, it was not said whether he was a drug user, and how he could be sure a purchase could be made inside this home, and indeed whether a seller would allow a random purchaser to see his stock supply and to see where weapons were stored. Likewise omitted was any reference to the quantity of what was purchased, the amount of money involved, the source of the funds used and whether these were documented funds.

Granted, one seeking relief under *Franks v. Delaware*, 438 U.S. 154 (1978), as in the case here, must show by the preponderance of the evidence that the search warrant Affidavit contains a false, material statement (or statements) that was intentionally made, or was made with a reckless

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> determine that such a probability exists. This holding requires evidence sufficient to provide a basis for that judgment.

United States v. Allen, 211 F. 3d 970, at 976 (6th Cir. 2000). (*Emphasis in original.*)

disregard for the truth. Significant here, *Franks* has been extended to cover material omissions as well as false or misleading statements. *See United States v. Timblin*, 46 F.3d 1369, at 1377 (5th Cir. 1995). This is significant because the contention is here made that some of the omitted facts (from the Affidavit), which are clearly critical to a finding of probable cause, demonstrate a recklessness that can "be inferred from the proof of the omission itself" *United States v. Martin*, 615 F.2d 318, at 329 (5th Cir. 1980).

ARGUMENT NO. V:

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE CANNOT BE INVOKED WHERE THE AFFIDAVIT DID NOT PROVIDE THE COURT THAT ISSUED THE WARRANT WITH A SUBSTANTIAL BASIS FOR DETERMINING THE EXISTENCE OF PROBABLE CAUSE AND WHERE THE AFFIDAVIT AND WARRANT WERE SO FACIALLY DEFICIENT THAT NO OFFICER COULD REASONABLY RELY ON IT.

In this case, the Court, almost as an after-thought, made the determination that the officers in this case had acted in *good faith*. What the Court precisely *said* was:

> . . . that absent a showing that information in there was false and that the affiant knew it was false at the time and it was material to the execution of the warrant, then the officers had a good faith belief under *United States v. Leon* and *Illinois v. Gates* to execute the warrant. So without more the motion to suppress is overruled.

Transcript, p. 26. In so doing, it is significant to note the Court made absolutely no factual findings whatsoever. This follows although it could not be any clearer that the information in the Affidavit did not provide a probable cause basis for the issuance of any warrant. Also, it is likewise clear the warrant centralized in this case was supported by an Affidavit that was "so lacking in indicia of probable cause to render official belief in its existence entirely unreasonably," *United States v. Leon*, 468 U.S. 897, at 923 (1984).

Here, we start with the fact, and it is a fact, that the Affidavit was crafted by the affiant in the worse possible light. Indeed, in a sizeable segment of the Affidavit, the affiant, in great detail, advised the Magistrate of Henry Caldwell's past misdeeds and of his asserted involvement in the *alleged* controlled sales supposedly made to the "source." *Defendant's Motion to Suppress, J.A., pp. 18-19.* This obviously was done to help influence the Magistrate into adopting the affiant's opinion that there was a very real likelihood that, based on the affiant's assertions, he had made drug purchases from Henry Caldwell on these premises and had seen the weapons he described on the premises. Any well-trained officer would surely have known, or should have known, that loading the Affidavit with misinformation was not a viable substitution for the need there was here for a collateral showing of probable cause, which *must* be set forth in the Affidavit. And, that need is not met by showing the person targeted has a criminal record.

The point made above becomes all the more viable when one realizes the Court ultimately declared that the extensive references to Henry Caldwell in the Affidavit were merely *gratuitous*. *Transcript, p. 25.* This, however, is augmented by counsel-opposite's argument that the extensive references to Henry Caldwell were actually irrelevant. And, that this was

so because the warrant was directed at the home, not at Henry Caldwell. *Id., p. 18.*

These superlative observations firmly make it clear why, as one Court has said: *good faith* is not a magic lamp for a court to rub whenever the determination is made that the warrant process relied on, which led to the discovery of drugs, was flawed. Having said that, and given the affiant was one of the officers supervising this search, it would be more than slightly disingenuous for the Government to now claim that (although the Magistrate was not given constitutionally sufficient information to justify a search), the search made by this officer is insulated because he acted in good faith.

CONCLUSION

In *United States v. Smith*, 182 F. 3d 473 (6th Cir. 1999), our Court seemed clearly to have made the effort to emphasize that: ". . . if the prior track record of an informant adequately substantiates his credibility, other indica of reliability are not necessarily required." *Id., p. 483.* This insuperable thesis when read along with the emphasis put on what was said in *United States v. King*, 227 F. 3d 732 (6th Cir. 2000), as to be extensive corroboration referred to in that case, is truly significant here. Indeed, in *King*, the informant in that case was well known, which really augments our thesis. Simply put, what was said there should have been enough to carry the day here for the Petitioner on the facial sufficiency of the Search Warrant Affidavit issue. Also see *United States v. Wilhelm*, 80 F. 3d 116 (4th Cir. 1999), an Opinion that, with a few slight tweakings, could have been written for this case. There the Court, in adopting what is our primary thesis (*i.e.*, that the Affidavit for the Search Warrant did not set forth probable cause sufficient to support any finding of probable cause to search), emphasized, as we have done, that the Affidavit was "depend[ent] on information from

an unnamed informant, and provided no indication of the informant's truthfulness or reliability." (*Id., at p. 118.)* Stated another way, the flaw recognized by *Wilhelm*, and contended for by the Petitioner as being dispositive here, seems clearly to be an endorsement of what the Court said in *United States v. Smith*, 182 F. 3d 473 (6th Cir. 1999). There it was said that:

> In order for a Magistrate to be able to perform his official function, the Affidavit must contain adequate supporting facts about the underlying circumstance to show that probable cause exists for the issuance of the warrant.

Id., p. 477.

If nothing else it could not be any clearer that within the four corners of the Affidavit involved in this case, probable cause was not set forth. With this being so, if this Court subscribes to the notion that mere suspicion, rumor or even strong reasons to suspect are not sufficient to establish probable cause, this aspect of the Fourth Amendment issued should be resolved in the Petitioner's favor.

Postured by the above arguments, this case should be reviewed. And this to the end that the judgment of the Court of Appeals can be reversed and the case remanded with directions to enter a judgment voiding the convictions visited on the Petitioner.

Respectfully submitted,

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Attorney for Petitioner,
Henry Caldwell

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINTON, DC 20543-0001

NO. 04A662
[Dated: January 29, 2005]

Mr. James R. Willis
The 113 St. Clair Building
113 St. Clair Ave., N.E., Suite 440
Cleveland, OH 44114-1214

Re: Henry Caldwell
v. United States
Application No. 04A662

Dear Mr. Willis:

The applications for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on January 29, 2005 extended the time to and including March 5, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/_____
Melissa Blalock
Case Analyst

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4294

[Filed: November 05, 2004]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY CALDWELL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

Before: MERRITT, MOORE, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Henry Caldwell entered a conditional plea of guilty to possession of more than 50 grams of cocaine base (crack) with the intent to distribute, and to possession of a firearm after having been convicted of a felony. Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, Caldwell reserved the right to appeal the

decision of the district court that denied his motion to suppress the evidence.

On appeal, Caldwell argues that (1) the affidavit supporting the search warrant did not provide probable cause for the search, (2) the district court erred in denying him a *Franks* hearing or, in the alternative, an *in camera* proceeding to determine the reliability of the information source, and (3) the district court erred in applying the *Leon* good-faith exception to the present case. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

In April of 2002, a municipal judge in Akron, Ohio authorized a search of 136 Bachtel Avenue, Akron, Ohio for evidence of drug trafficking. Detective A. Stump, a 22-year veteran of the Akron Police Department, filed an affidavit in support of the application for the search warrant. He explained in the affidavit that, over the course of one week, he had gone to 136 Bachtel Avenue accompanied by an "information source" and that the source had, on two separate occasions, entered the residence and made controlled purchases of crack from Caldwell. According to Stump, the source "observed a large quantity of crack cocaine inside of the premises" during the first purchase and, during the second purchase, "the source observed several assault type firearms inside of the premises."

Officers from the Akron Police Department executed the search warrant and seized a Glock. 45 caliber pistol and over 50 grams of crack from the residence in question. Caldwell was present during the search. A grand jury returned a two-count indictment against Caldwell, charging him with (1) being a felon in possession of a firearm, based upon his

previous drug trafficking, robbery, and felonious assault convictions, and (2) possessing crack with the intent to distribute.

Caldwell moved to suppress all of the physical evidence seized during the search. After hearing arguments, the district court denied Caldwell's motion. Caldwell then entered a conditional plea of guilty to both counts of the indictment, but reserved his right to appeal the denial of his motion to suppress. The district court entered judgment against Caldwell in September of 2003, sentencing him to 262 months of imprisonment and 10 years of supervised release. This timely appeal followed.

II. ANALYSIS

A. Standard of review

We will set aside the factual findings of the district court in denying a motion to suppress only if clearly erroneous, which means that "the factual findings will be overturned only if the reviewing court has the definite and firm conviction that a mistake has been committed." *United States v. Pinson*, 321 F.3d 558, 562 (6th Cir. 2003) (citation and quotation marks omitted). The legal conclusions of the district court, on the other hand, are reviewed de novo. *Id.* When reviewing an affidavit in support of a search warrant, we consider the "totality of the circumstances" and ask the "commonsense, practical question of whether there is probable cause to believe that contraband or evidence is located in a particular place." *Id.* (citations and quotation marks omitted). We also accord great deference to a magistrate judge's determination of probable cause. *Id.*

B. The affidavit supporting the search warrant provided probable cause

According to Caldwell, the affidavit underlying the search warrant failed to show probable cause because the statements made by the information source were not corroborated. Caldwell argues that "this Affidavit is even less than a barebones affidavit in that it only shows the affiant's naked endorsement of what his alleged source supposedly told him." The facts, however, belie Caldwell's argument.

This court has held that "where a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached magistrate *may* believe that evidence of a crime will be found." *Pinson*, 321 F.3d at 563 (emphasis in original) (*quoting United States v. Allen*, 211 F.3d 970, 976 (6th Cir. 2000) (en banc)). In *Pinson*, this court considered the sufficiency of an affidavit similar to the affidavit in the present case. The defendant in *Pinson* pled guilty to various drug trafficking offenses, conditioned upon his right to appeal the district court's denial of his motion to suppress the evidence seized by the police. Pinson argued, like Caldwell, that the affidavit supporting the search warrant was a "bare bones" affidavit lacking evidence of the confidential informant's (CI's) reliability.

This court held that the affidavit in *Pinson* provided probable cause for the search, reasoning that the affiant stated that he knew the CI, named the CI to the magistrate, averred that the CI had provided reliable information in the past, and noted that the CI had personally purchased cocaine from the location at issue in the search warrant. Also significant was the fact that the affidavit related that the officer had personally

observed the CI make the controlled purchase, that he had patted down the CI before and after the purchase, and that the substance purchased by the CI tested positive for cocaine. *Id.* at 563.

The facts of *Pinson* are similar in many ways to those in the present case. Detective Stump watched Akron narcotics officers pat-down the source prior to each of the two controlled purchases to ensure that the source was not carrying any drugs or money of his own. On these two occasions, the source, after being provided with money from the Akron Police Department, entered the premises in question and exited shortly thereafter. Detective Stump said that upon the source's return from the premises, "the source delivered to affiant a quantity of cocaine that the source stated was purchased from Henry Lamont Caldwell within the premises with the funds previously provided." In addition, the source told Detective Stump that the source had observed a large quantity of crack inside the premises during the first controlled purchase and several assault firearms on the premises during the second controlled purchase.

The primary differences between this case and *Pinson* are that (1) the source here does not appear to have been named to the magistrate, and (2) the past reliability of the source is less clear. In *Pinson*, the officer attested to the CI's reliability based upon "past information received from said CI resulting in the lawful recovery of narcotics." *Pinson*, 321 F.3d at 561. Detective Stump's description of the reliability of his source is not as detailed. He averred

> that the information source listed in the previous paragraphs of this affidavit has provided the affiant with information concerning the possession and sale of controlled substances in the Akron, Ohio area, which

> information has been corroborated by Detective A. Stump. Further, the information source has displayed [] specific knowledge as to the uses, effects and distribution patterns of controlled substances in the Akron, Summit County, Ohio area.

Although the above statement is somewhat less emphatic than in *Pinson* as to the reliability of the source, there is no material difference in their legal effect, especially where the officers in both cases actually witnessed the controlled purchases.

The fact that the informant in this case was not identified to the judge issuing the search warrant, moreover, is not fatal to the establishment of probable cause. *See, e.g., United States v. Davidson*, 936 F.2d 856 (6th Cir. 1991) (finding sufficient probable cause for a warrant even without considering the information provided by an unidentified informant). Here, there was adequate corroboration to counter the fact that the informant was unidentified. As this court has noted, "an affidavit that supplies little information concerning an informant's reliability may support a finding of probable cause, under the totality of the circumstances, if it includes sufficient corroborating information." *United States v. Woosley*, 361 F.3d 924, 927 (6th Cir. 2004).

An affidavit in support of a search warrant must be reviewed "in a commonsense -- rather than a hypertechnical -- manner," and this court must "consider whether the totality of the circumstances supports a finding of probable cause." *Id.* at 926. Given this standard of review and Detective Stump's eyewitness corroboration of the source's controlled buys, we find no error in the district court's conclusion that the search in question was supported by probable cause, even though the informant was unidentified.

C. The district court did not err in denying Caldwell a *Franks* hearing or, in the alternative, an *in camera* proceeding

Caldwell argues that the district court erred by denying him a *Franks* hearing to verify the source's reliability. A so-called *Franks* hearing is based upon the case of *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), which calls for an evidentiary hearing where a defendant raises a substantial question as to whether the affidavit supporting the search warrant contained materially false information. *Id.* at 156.

In an affidavit dated three months before entering his conditional guilty plea, Caldwell denied that he participated in the two controlled drug purchases. He argues that this denial "makes it clear that the likelihood is good" that no information source exists. Alternatively, Caldwell contends that if the source does exist, then Detective Stump must have falsely characterized the information actually provided by the source. Caldwell concludes that the allegations made against him in the affidavit call the reliability of the affiant and of the source into question, and that either a *Franks* hearing or an *in camera* proceeding should have been conducted.

When a defendant seeks to demonstrate that an affidavit underlying a search warrant contained false information, the defendant must make a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the affidavit. *United States v. Rodriguez-Suazo*, 346 F.3d 637, 648 (6th Cir. 2003) (citing *Franks*, 438 U.S. at 155-56). "'[I]f the allegedly false statement is necessary to the finding of probable cause,' the court must conduct a hearing on the

issue upon the defendant's request." *Id.* (quoting *Franks*, 438 U.S. at 155-56). "The intentionally or recklessly false statement must be made by the affiant [himself], not the non-governmental informant." *Id.*

In *Rodriguez-Suazo*, this court considered an argument identical to Caldwell's. The defendant contended that either the confidential informant whose tip supplied the basis for the search warrant did not exist, or that the affiant -- a Detroit police lieutenant -- falsified the information about the informant in the affidavit. *Id.* at 647. Rodriguez-Suazo sought to attack the reliability of the CI and the affiant by offering his own affidavit, denying the allegations against him. This court held that Rodriguez-Suazo's affidavit, "even if believed, does not equate to proof that the affiant lied or was recklessly indifferent to the truth." *Id.* at 648. Caldwell similarly failed to make a substantial showing that Detective Stump knowingly and intentionally, or with reckless disregard for the truth, included false statements in the affidavit. The district court was therefore justified in its denial of a *Franks* hearing.

Caldwell also contends, in conjunction with his argument about the *Franks* hearing, that he was entitled to an *in camera* proceeding to verify that the affiant did not simply fabricate the source. He relies upon the following dicta from this court's decision in *United States v. Giacalone*, 853 F.2d 470 (6th Cir. 1988), to support his argument:

> We believe that the trial judge should retain the discretion to determine what type of hearing is necessary, if any, to determine the veracity of the affiant in cases where the defendant has alleged that the affidavit contains false information, but has failed to make a substantial preliminary showing' that the

> *affiant* has lied such as that which would require a *Franks* hearing.

Id. at 478 n. 1 (emphasis in original).

Caldwell fails to cite any case, however, where a court has allowed some form of an *in camera* proceeding in lieu of a *Franks* hearing under circumstances similar to the present case. We therefore find no error in the district court's denial of an *in camera* proceeding.

D. Good faith exception

Caldwell's final argument is that, if we should determine that the search warrant is invalid, then the good faith exception to the exclusionary rule would not save the warrant. This argument is based upon the case of *United States v. Leon*, 468 U.S. 897, 922, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984), in which the United States Supreme Court held that evidence obtained pursuant to a search warrant upon which the law enforcement officers who executed the search relied in good faith will not be suppressed, even if the warrant is later found to be invalid. Because we conclude that there was no error in the issuance of the search warrant in question, we have no need to consider this argument.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. 5:02 CR 375

[Filed: June 12, 2003]

UNITED STATES OF AMERICA	)
	)
vs.	)
	)
HENRY CALDWELL	)
	)

Minutes of Proceedings before
DONALD C. NUGENT
United States District Judge

COURT REPORTER: Cynthia Lee
Suppression Hearing

APPEARANCES: Plaintiff: Nancy Kelly, Esq.
Defendant: James R. Willis, Esq.

Proceedings: A suppression hearing held. Arguments of both counsel heard by the Court. The Court denies the Motion To Suppress. Trial is scheduled for July 9, 2003 at 8:30 a.m.

Jeane Wells Ruprecht
Courtroom Deputy